

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:

KEITH L. BOSEK,

Respondent.

HUDALJ 95-5018-DB

Decided: April 21, 1995

Keith L. Bosek, *pro se*

Michael D. Noonan, Esquire
For the Government

Before: CONSTANCE T. O'BRYANT
Administrative Law Judge

INITIAL DETERMINATION

Statement of the Case

This proceeding arose pursuant to 24 CFR Part 24, Subpart G. On November 7, 1994, Nicholas P. Retsinas, Assistant Secretary for Housing-Federal Housing Commissioner of the U.S. Department of Housing and Urban Development ("HUD"), notified Respondent Keith L. Bosek that, to protect the public interest, consideration was being given to debar him from further participation in primary covered transactions and lower tier covered transactions as either a participant or principle at HUD and throughout the federal government, and from participating in procurement contracts with HUD for a period of three years from the notice date. In addition, pending final determination of the debarment, Respondent was temporarily suspended from further participation in such transactions and contracts.

The basis of the suspension and proposal of debarment was that Respondent had been convicted in the United States District Court for the District of North Dakota, Southeastern Division, for violation of Title 18 § 1012, United States Code. Since Respondent had participated in a covered transaction, and was reasonably expected to participate in covered transactions in the future, he was deemed to be a participant and a principle, as defined in Title 24, Code of Federal Regulations, §§ 24.105(m) and (p). On

November 22, 1994, Respondent exercised his right to appeal the Assistant Secretary's decision by filing an appeal with HUD.

Because HUD's action is based solely on a conviction, the hearing in this case was limited by 24 CFR § 24.31(b)(2)(ii) to submission of documentary evidence and written briefs. On December 15, 1994, I issued a Notice Of Hearing And Order which established a schedule for the filing of briefs. In compliance with that Order, HUD filed its Government's Brief In Support Of Suspension And Debarment ("Government's Brief") on January 12, 1995. Respondent filed his reply ("Respondent's reply") on January 31, 1995. On March 17, 1995, the Government filed its Response To Respondent's Reply ("Government's Response").¹

Findings of Fact

¹My Order of December 15, 1994, required the Government to file its Brief by January 16, 1995; the Respondent to file a reply brief by February 16, 1995; and the Government to file a response to Respondent's reply brief by March 3, 1995. Respondent filed his reply brief on January 31, 1995; however, he apparently did not send a copy to the Government. On March 10, 1995, the Government filed a Motion to Dismiss for Lack of Prosecution. Upon notification that Respondent had timely filed a reply brief, it withdrew said motion and submitted a response on March 17, 1995. Under the circumstances, I find good cause to accept the Government's March 17, 1995, filing and have considered its contents in reaching the decision in this case.

On July 27, 1994, Respondent pleaded guilty to Count One of a One-Count Information in the United States District Court for the District of North Dakota, Southeastern Division, charging violation of 18 U.S.C. § 1012.² The Count charged Respondent with influencing HUD on December 12, 1990, to enter into contract and willfully failing to disclose to HUD his ownership of property at 1015 South University Drive, Fargo, North Dakota, to which the contract related.³ Respondent entered into a contract to sell said property to Todd and Linda Aamold ("purchasers"). The purchasers applied for and received an FHA insured mortgage in the amount of \$51,350 on the property which enabled them to finance the purchase of the property. Respondent entered into a scheme with the purchasers influencing HUD to insure the FHA loan. As part of the scheme he willfully did not disclose his interest in the property. In order to qualify for the FHA loan, Respondent participated in the falsification of a gift letter which stated that the purchasers received a gift in the amount of \$2,200 from Ms. Aamold's father. In order to meet the FHA equity requirements to qualify for the FHA loan, the Aamolds had to establish that they had the \$2,200. Respondent also reimbursed the purchasers for their closing costs in the amount of \$1,739.28 and deposited funds into the Aamolds' checking account so that a Verification of Deposit could be presented to the Mortgagee establishing purchasers' financial ability to purchase the property. By his own admission, Respondent participated in a scheme to supply a false gift letter to establish that the Aamolds could qualify for an FHA insured loan. This falsification was done with the intent to influence HUD to enter into contract with the Aamolds.

Jurisdiction

HUD's authority to sanction persons under 24 CFR Part 24 is defined in the regulations at 24 CFR § 24.110(a). Respondent has presented no challenge to jurisdiction. He has not alleged that he is not a "participant" or a "principal" as defined by 24 C.F.R. Part 24, and there is ample evidence to support finding that he is both. He has, instead, presented argument which are offered in mitigation of debarment. In his appeal, he urges as reasons that he should not be debarred: 1) although he now knows what he did was wrong and a serious act, he was misled at the time he acted into believing that what he was doing was within HUD's guidelines; 2) pursuant to 24 C.F.R. § 24.115(d), favorable consideration should be given to him because he offered to assist

²*Information*, United States District Court, District of North Dakota, Southeastern Division, July 27, 1994. *U. S. v. Keith L. Bosek*, Criminal No. C3-94-54. GX-A.

³*Judgment in a Criminal Case*, United States District Court, District of North Dakota, Southeastern Division, July 27, 1994. GX-A.

the Government in the investigation in this case in 1991 and also 1994; and, 3) to debar him would constitute double jeopardy. *Respondent's Reply*.

Cause for Debarment

The basis for suspension and debarment included in HUD's notice to the Respondent, *Government's Brief*, is Respondent's judgment and conviction in the U. S. District Court for the District of North Dakota, Southeastern Division, of the crime of violating 18 U.S.C. § 1012, Department of Housing and Urban Development transactions. *Government's Brief, Exhibit A*. On or about December 28, 1990, Respondent did induce and influence HUD to enter into a contract and willfully failed to disclose any interest he had in such property or the property to which such contract related. *Id, Exhibit B*.

Respondent's plea of guilty, and his subsequent conviction, is conclusive as a basis of debarment. Respondent's conviction was based on his fraudulent, and deceitful participation in the process by which the Purchasers (the Aamolds) received approval for the FHA Loan. 24 C.F.R. Part 24, as set forth in 24 C.F.R. §§ 24.305(a)(1), (a)(3), (a)(4), and (d), provides that debarment may be imposed for:

(a) Conviction of or civil judgment for:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

* * *

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.

* * *

(d) Any other cause of serious or compelling a nature that it affects the present responsibility of a person.

The debarment proceeding in this case is based on the above-shown criminal conviction of Respondent for inducing and influencing HUD to enter into a contract and willfully failing to disclose his interest in property which was the subject of the contract. Although cause for debarment must be established by a preponderance of the evidence, where the debarment is based upon a conviction, the evidentiary standard is deemed to be met. 24 CFR § 24.313(b)(3). The Government, by submitting documentary evidence of Respondent's conviction in the form of a copy of the *Judgment*, has met its burden of demonstrating cause for Respondent's debarment. Under the regulation found at 24 CFR § 24.313(b)(4), the burden then shifts to the respondent to show mitigating circumstances. Further, because Respondent's criminal conviction is cause for his debarment, it is also cause for his suspension. 24 CFR § 24.405(a)(2).

In his reply to the Government's brief, Respondent acknowledges that he broke the law by violating HUD and FHA rules and regulations on numerous occasions. What he offers as mitigating circumstances is that he did not, at the time, know that he was breaking the law. He asserts that he relied on the advice of a loan officer that "[a]ll F.H.A. really cares about is that no one's check bounces at closing," and was misled into believing that what he was doing was "within HUD guidelines." *See Respondent's Reply Brief, at ¶ 2 and ¶ A.* He also asserts that he should not be debarred because he "helped with the investigation in 1991, [and] also helped Agent Smith in 1994. I even offered my assistance in a sting operation to agents Smith and Loucks." By this Respondent asserts as mitigation his willingness to assist in the investigation of criminal wrongdoing by others who were involved in criminal activities similar to that in which he was involved. He asserts that this shows he has accepted responsibility in this matter, and that his intentions are to run his business completely by the book. Finally, Respondent asserts that his claim of double jeopardy should bar imposition of debarment in this case. He asserts that he has already received a Limited Denial of Participation ("LDP") "for the same exact infraction on the exact same property in January of 1991. (*See Respondent's Brief, Exhibit "A"*)

I conclude that the reasons he has offered do not constitute mitigating circumstances which would justify not taking the action HUD has proposed. First, Respondent's insistence that he did not know that he was doing anything wrong at the time and thought that what he was doing was "within H.U.D. guidelines", shows that, despite his guilty plea, he has not accepted full responsibility for his conduct. Further, as the Government has pointed out, although he states he offered to assist in the investigation of criminal wrongdoings of others, he has provided no information that he actually has supplied helpful information. Finally, as to his claim that double jeopardy should bar prosecution of this claim, he has not demonstrated that the prior sanction imposed in January 1991 related to the exact same contract and property at issue in this

case. Based upon the information he provided (*See Respondent's Reply Brief, at ¶5 and Exhibit A*), he received notice of LDP from the HUD Minneapolis Office in January 1991, regarding two transactions in which he participated - one regarding property located at 809 North 12th Street, Moorhead, Minnesota, and the other regarding property located at Rural Route 1, Moorhead, Minnesota. Respondent's conviction which is the basis for this debarment proceeding relates to property located at 1015 South University Drive, Fargo, North Dakota. *See Government's Brief, p.1*. Accordingly, Respondent has not shown that the exact same contract and property are at issue as in the prior LDP.

Responsibility and the Public Interest

It is the policy of the federal government to do business only with responsible persons. 24 CFR § 24.115(a). The debarment process protects governmental interests not safeguarded by other laws. It is not intended as a punishment. *Id.* at § 24.115(b); *See also Joseph Constr. v. Veterans Admin.*, 595 F. Supp. 448, 452 (N.D. Ill. 1984). Government and public interests are safeguarded by precluding persons who are not responsible from participating in government programs. *See Agan v. Pierce*, 576 F. Supp. 257 (N.D. Ga. 1983); *Stanko Packing Co., Inc. v. Bergland*, 489 F. Supp., 947, 948-49 (D.D.C. 1980); and *Roemer v. Hoffman*, 419 F. Supp 130, 131 (D.D.C. 1976).

The term "responsibility" as used in the regulations governing suspension and debarment, is a term of art which includes the honesty and integrity of the participant as well as the participant's ability to perform. *In re Chesley Doak*, HUDBCA No. 89-4364-D12 (May 24, 1989); *see also Roemer v. Hoffman*, 419 F. Supp. 130 (D.D.C. 1976). It encompasses the projected risk of a person doing business with HUD. The primary test for debarment is present responsibility, although a finding of present lack of responsibility can be based on past acts. *Schlesinger v. Gates*, 249 F. 2d 111 (D. C. Cir. 1957), *cert. denied*, 355 U. S. 939, (1958). The charge for which Respondent Bosek was convicted is very serious and is indicative of his lack of present responsibility, honesty and integrity and demonstrates that Respondent poses a risk to the integrity of HUD programs. I agree with the Government that the fact that the U. S. District Court directed Respondent to make restitution to HUD in the amount of \$34,583.75, and the allegations stated in the Information, Plea Agreement and Judgment of Conviction that Respondent received proceeds of the FHA Loan which was obtained on false and fraudulent documentation that he supplied, emphasize the risk to HUD should Respondent be permitted to continue to participate in HUD's programs. His conviction specifically relates to fraudulent acts committed by Respondent in his participation in

HUD transactions.

Deterrence

Since it is the responsibility of the federal government to protect the public interest, HUD should do business only with responsible persons. 24 CFR § 24.115(a). The purpose of debarment is not to punish a participant for past misconduct but is designed as a sanction to protect the public and federal government interest. Deterrence is also a legitimate purpose of debarment. *In re: Arc Plumbing and Heating Corporation*, HUDBCA No. 88-3459-D68, Docket No. 88-1273-DB (Feb. 2, 1990); *In re: Rudolph J. Hymer*, HUDALJ 90-1552-DB (Mar. 14, 1991). Also, while debarment cannot be imposed for punitive purposes (24 C.F.R. § 24.115) the inadvertent punitive effect of debarment does not transform it into a purely punitive sanction. *Janik Paving and Construction, Inc. v. Brock*, 828 F.2d 84, 91 (2d Cir. 1987). The deterrent effect of debarment and suspension is an important reason for HUD to carry out its mandate of protecting the public interest by suspending and debarring those persons found to be presently irresponsible. *See, In the Matter of Rudolph J. Hymer*, HUDALJ 90-1552-DB (Mar. 14, 1991); *In the Matter of Dennis I. Ackerman*, HUDALJ 87-1201-DB (Feb. 26, 1988); *In the Matter of Theodore A. Hummell*, HUDALJ 84-929-DB (June 1, 1984).

In this matter, Respondent was charged with, plead guilty to, and was convicted of inducing and influencing HUD to enter into a contract and willfully failing to disclose any interest that he had in such property, as described. This meets the Government's burden of proof of showing lack of present responsibility sufficient to justify debarment. And, debarment in this case would promote confidence in the federal government and would serve as deterrence to others who might be tempted to engage in a similar scheme to defraud. If Respondent were to escape debarment or suspension in this case, he as well as others could perceive HUD to condone his actions, and they may be led to believe that HUD's lack of forceful action means that HUD itself does not consider Respondent's prior actions to be serious. *See In the Matter of Richard G. Belin*, HUDALJ 94-0058-DB (1994). Respondent's criminal actions are indeed serious, and it is imperative that a strong message be sent to Respondent and the public that engaging in such a scheme to defraud will not be tolerated. For these reasons, the suspension pending the outcome of debarment proceedings and the debarment itself are deemed to constitute an appropriate governmental response, and they will be upheld in the order issued below.

Conclusion and Order

Upon consideration of the public interest and the entire record in this matter, I conclude and determine that cause exists for the three-year period of debarment of

Respondent Keith L. Bosek, and his suspension pending the pendency of this determination.

So **ORDERED.**

CONSTANCE T. O'BRYANT
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this INITIAL DETERMINATION issued by
CONSTANCE T. O'BRYANT, Administrative Law Judge, HUDALJ 95-5018-DB, were
sent to the following parties on this 21st day of April, 1995 in the manner indicated:

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